

THE OREGON LAW COMMISSION BRAVES CONTROVERSIES IN AUTO INSURANCE

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A. INTRODUCTION

As common as car wrecks, insurance disputes entangle Oregonians and their insurers. With regularity, they discover “gotcha’s” in insurance law. The disputes come not from a neglect on the roadway that may be inevitable, but from a neglect of insurance statutes that may be unforgivable. Until recently, no one addressed the problems. The legislature’s oversight of the insurance scheme has been only reflexive responses to anecdotes—sad stories have prompted legislation.¹ More often, the legislature has lacked the time, savvy, or political will to address the problems. Busy with administration, the state’s Insurance Division has proposed little, if any, repair of insurance statutes in the last twenty-five years.² Oregon’s courts have addressed in-

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1. *See, e.g.*, *Barackman v. Anderson*, 109 P.3d 370 (Or. 2005) (prompting 2007 Or. Laws, ch. 328, § 3 (enacting legislation yet to be codified in OR. REV. STAT. chapter 742 making arbitration rulings unavailable as issue preclusion in subsequent personal injury litigation)); *Vega v. Farmers Ins. Co. of Or.*, 918 P.2d 95 (Or. 1996) (prompting 1997 Or. Laws, ch. 808, § 2 (amending OR. REV. STAT. § 742.504(4) to add “exhaustion clause” to sample underinsured motorist policy terms so as to require insured person’s recovery of liability insurance proceeds before assertion of underinsured motorist claim)); *Bauder v. Farmers Ins. Co. of Or.*, 725 P.2d 350 (Or. 1986) (prompting 1987 Or. Laws, ch. 632, §3 (amending OR. REV. STAT. § 742.542 to limit offset of personal injury protection benefits against uninsured motorist benefits)); *Yokum v. Farmers Ins. Co. of Or.*, 844 P.2d 937 (Or. Ct. App. 1993) (prompting 1997 Or. Laws, ch. 808, § 10 (amending OR. REV. STAT. § 742.542 to limit offset of personal injury protection benefits from underinsured motorist benefits)); *Babb v. Mid-Century Ins. Co.*, 821 P.2d 424 (Or. Ct. App. 1991) (prompting 1993 Or. Laws, ch. 709, § 9 (enacting OR. REV. STAT. § 742.544 to limit reimbursement of personal injury protection benefits from insured person’s insurance recoveries)).

2. In 1981, the Insurance Division proposed the addition of underinsured motorist cover-

surance disputes, but only on a case-by-case basis and always within the confines of imperfect statutes.³ Not only has oversight failed public policy, oversight has neglected glitches in insurance law.

Recently, the Oregon Law Commission braved the controversies surrounding auto insurance. The Commission has an advantage since it is charged with the duty to discover and remedy “defects and anachronisms in the law.”⁴ It can be apolitical. With that advantage, it has been a catalyst for modest but meaningful law reform. In 2003, the Commission established an Automobile Insurance Work Group.⁵ In 2005 and 2007, the Commission recommended five bills, which were all enacted into law.⁶ Coincidentally, other repair concepts, which had been proposed in the Commission’s work group, were later promoted by the Oregon Trial Lawyers Association and enacted into law.⁷ Yet

age to Oregon’s scheme of uninsured motorist coverage. *See Minutes: Final Hearings of the J. Comm. on the Judiciary* 4 (October 5, 1980) (regarding the recommendations of the Insurance Subcommittee); *Minutes: Hearing Before the Subcomm. on Ins. of the J. Comm. on the Judiciary* 1-2 (September 12, 1980).

3. *See, e.g.*, *N. Pac. Ins. Co. v. Hamilton*, 22 P.3d 739 (Or. 2001) (holding family member semi-exclusion of liability coverage was vague and unenforceable); *Carrigan v. State Farm Mut. Auto. Ins. Co.*, 949 P.2d 705 (Or. 1997) (upholding personal injury protection coverage for car-jacking injury); *Viking Ins. Co. v. Perotti*, 1854 P.2d 1081 (Or. 1989) (holding that insurer had duty to defend insured because “named driver” policy did not satisfy requirements of financial responsibility law); *Viking Ins. Co. v. Peterson*, 784 P.2d 437 (Or. 1989) (invalidating exclusion of driver under age 25 from insurance policy as contrary to the financial responsibility law).

4. OR. REV. STAT. § 173.338(1)(a) (2005).

5. The members of the work group were chair Martha Walters, now an Associate Justice of the Oregon Supreme Court; John Bachofner; Joel DeVore; Dean Heiling; Neal Jackson; Richard Lane; Tom Mortland; Stephen Murrell; retired Justice Edwin Peterson; and Senator Charles Ringo.

6. In 2005, four bills were signed into law: Senate Bill 923, relating to recovery of underinsured motorist (UIM) benefits when multiple claimants seek benefits despite matching liability and UIM limits; Senate Bill 924, providing UIM benefits when a policyholder is injured by the policyholder’s own stolen car; Senate Bill 925, clarifying provisions governing overlapping policies; and Senate Bill 926, providing uninsured and underinsured motorist (UM/UIM) benefits even when liability insurers become insolvent more than two years after an accident. In 2005, a fifth bill, Senate Bill 922, relating to self-insurers and UM/UIM benefits, passed in the Senate but died in a House committee. The proposal was revived in the next session as House Bill 2385. In 2007 two bills were signed into law: House Bill 2384, making a minor house-keeping change in the provisions on overlapping insurance clarified with the prior Senate Bill 925; and House Bill 2385, making changes in liability coverage required of self-insurers and providing UM/UIM benefits when self-insured vehicles cause injury.

7. In 2007, the Oregon Trial Lawyers Association (OTLA) successfully promoted House Bill 2908 and House Bill 3086, involving the peculiar exclusion of UIM benefits for injuries caused by government vehicles. House Bill 3086 also eliminated the reduction in liability coverage for injuries to household or family members. These bills are discussed in this article, since they tackle issues identified by Commission’s work group. OTLA also successfully

another repair proposal, which the work group dropped, may be picked up by Oregon's appellate courts. By the end of this decade, a host of insurance problems will be exorcized. Many of them will have vanished due to temerity of the Oregon Law Commission to see, despite controversy, anachronism inviting remedy.

B. COMMISSION BILLS

1. Rental Cars

Based on the Commission's proposal in 2007, House Bill 2385 simultaneously repaired a gap in auto liability insurance and a gap in uninsured and underinsured motorist (UM/UIM) coverage.⁸ The gap in liability insurance appeared, most notably, in insurance on many rental cars. The related gap in UM/UIM coverage appeared in every Oregonian's auto policy.

a. A "Self-Insured" Hole in Liability Insurance

In 1989, the Oregon Supreme Court established a fundamental principle in the Financial Responsibility Law. The Financial Responsibility Law mandates that every driver and car owner carry auto liability insurance with liability limits sufficient to pay \$25,000 per person or \$50,000 per accident.⁹ The court construed the statutes to require that insurance policies on cars must also provide liability coverage for anyone who drives with the permission of the owner.¹⁰ The legislature confirmed its agreement with the decision by codifying the requirement in the next session.¹¹

Not everyone, however, is required to buy insurance policies on their vehicles. Another way to comply with the Financial Responsibility Law is to become "self-insured."¹² Any entity which owns twenty-five or more vehicles may get a certificate of self-insurance from the

sponsored Senate Bill 255, relating to as insurer's election of means of recovery of personal injury protection (PIP) benefits, and Senate Bill 256, requiring three arbitrators in UM/UIM cases and eliminating issue preclusion from PIP arbitrations. These were not topics of the Commission's work group and will not be reviewed in this article.

8. H.B. 2385, 74th Leg. Assemb. (Or. 2007).

9. OR. REV. STAT. §§ 742.450, 806.060-070, 806.080.

10. Viking Ins. Co. v. Petersen, 784 P.2d 437, 438-39 (Or. 1989) (citing OR. REV. STAT. §§ 742.450(1), 806.270(3) (1989)); Viking Ins. Co. v. Perotti, 784 P.2d 1081 (Or. 1989).

11. 1991 Or. Laws, ch. 768, § 8 (codified at OR. REV. STAT. § 806.080(1)(b)).

12. OR. REV. STAT. § 806.060(2)(b).

Department of Transportation so long as the entity promises that it will “pay the same amounts” required by the Financial Responsibility Law.¹³ In *Farmers Ins. Co. v. Snappy Car Rental, Inc.*,¹⁴ the Oregon Court of Appeals construed the self-insurance statute narrowly, holding that the statute implied no requirement that a permissive driver of the car be covered by the car’s “self-insurance.”¹⁵ The requirement to “pay the same amounts” did not imply that the self-insurer must pay under the same circumstances required by the Financial Responsibility Law.¹⁶ Unlike everyday auto insurance, the “self-insurance” on self-insured cars provided nothing when a permissive driver drove.¹⁷ In this regard, self-insurance did not mirror a fundamental requirement of the Financial Responsibility Law.

Self-insurers are corporate entities, utilities, car dealers, and car rental businesses. Usually, permissive drivers carry their own liability coverage. Sometimes, the car owner is the driver’s employer who is vicariously liable and financially responsible. A problem, however, arose with rental cars. The rental agency was not the renter’s employer and could not be held vicariously liable for a renter’s negligence. If a car’s renter lacked liability coverage because she lied about coverage, was excluded from coverage, or had coverage canceled, the “self-insurance” statute failed to require auto liability coverage for the permissive driver of the self-insured car. These self-insured cars were not “insured” like traditionally insured cars. An accident victim struck by a rental car might well discover neither the adverse driver nor car had liability insurance.

In 2007, House Bill 2385 remedied the problem by amending ORS 806.130, the self-insurance statute, so as to cross-reference the mandate in the Financial Responsibility Law, ORS806.080, that a policy must cover permissive drivers.¹⁸ This liability coverage on the self-insured car is not an additional or “stacking” layer of coverage. It is a minimal coverage of \$25,000 per person or \$50,000 per accident that is available only if the driver lacks her own insurance.¹⁹

13. *Id.* § 806.130(3).

14. 876 P.2d 833 (Or. Ct. App. 1994).

15. *Id.* at 836.

16. *Id.* See also *Neal v. Johnson*, 962 P.2d 706 (Or. Ct. App. 1998) (holding that rental company was not liable under financial responsibility law where renter did not give driver permission to use the car).

17. *Id.*

18. OR. REV. STAT. § 806.130(1)(c).

19. *Id.* §§ 806.130(2)(a), 806.070(2). In addition, the self-insurer may seek reimburse-

b. The “Self-Insured” Hole in UM/UIM Coverage

Until the 2007 amendment, injured Oregonians could discover that, not only did the driver of the self-insured car have no liability coverage, but the offending driver would not be deemed an “uninsured” or “underinsured motorist” for purposes of the injured person’s own UM insurance. Although nothing would be paid by the adverse driver or owner, every Oregonian would be denied their own uninsured and underinsured motorist coverage. Every Oregonian buys UM/UIM coverage, but before 2007, all policies provided that a “self-insured” car was never an uninsured or underinsured car. By definition, the uninsured motorist statute declared that an “uninsured vehicle” was not a self-insured vehicle.²⁰ When the present UM statute was adopted in 1967,²¹ the assumption was that a self-insured vehicle would always provide enough liability money to pay damages equivalent to the minimal limits of \$25,000 per person or \$50,000 per accident.²² When the mandate for underinsured motorist coverage was added in 1981,²³ no one thought to change the exception that disqualified “self-insured” cars from recognition as uninsured or underinsured vehicles. Those were compound oversights. First, self-insured vehicles did not provide coverage for permissive drivers. As in the *Snappy Car* case, there may have been no money at all. Second, even when self-insurance did pay, it was only required to pay the minimal limits of \$25,000 per person or \$50,000 per accident. Even if it paid, the offending car could well be underinsured.²⁴

The Commission’s House Bill 2385 patched the hole in UM and UIM coverage by defining uninsured and underinsured cars to include “self-insured” cars that failed to provide liability insurance or that provided less than the insured’s UIM limit.²⁵ Coincidentally, the self-insurance statute has always mandated UM coverage on the self-insured car itself. As a concession to rental companies, the amended statute provides that the UM coverage provided for the occupants of

ment from the driver for any liability coverage paid, just as would a traditional insurer who is forced to cover a driver only by reason of the Financial Responsibility Law. *Compare id.* § 806.130(3) *with id.* § 742.460.

20. *Id.* § 742.504(2)(e)(B).

21. 1967 Or. Laws, ch. 482, § 3 (now codified in scattered sections of OR. REV. STAT. chapter 742).

22. OR. REV. STAT. §§ 806.060–806.070.

23. 1981 Or. Laws, ch. 586, § 1 (codified at OR. REV. STAT. § 742.502).

24. *Thompson v. Estate of Pannell*, 29 P.3d 1184 (Or. Ct. App. 2001).

25. 2007 Or. Laws, ch. 287, § 3 (to be codified at OR. REV. STAT. § 742.504(2)(j)(E)).

the self-insured car is secondary and exists only if the driver or occupants lack their own coverage.

2. *The Stolen Car Hole in UM/UIM Coverage.*

In 1988, Bert Cole was not the first or last person to discover another hole in Oregon's scheme of uninsured motorist coverage. He parked at a convenience store and left his key in his Suburban.²⁶ When he came out of the store, he saw someone stealing his car. He tried to stop the thief, but the thief ran over him with his own vehicle.²⁷ Odd as it may seem, it is a scenario reported periodically in the local section of hometown newspapers.²⁸ What is not reported is what usually happens next. Cole suffered medical bills of \$81,522 and wage losses of \$12,000.²⁹ He filed an uninsured motorist claim against his own insurer based on the negligence of the uninsured thief.³⁰ When his insurer denied the claim, the Oregon Court of Appeals upheld the denial.³¹ The policyholder's own car could not be deemed to be a stranger's uninsured car.³² Therefore, the definition of an uninsured vehicle permissibly excluded the insured person's own car.³³ The statute did not address the unusual circumstance when an insured is injured by her own vehicle under the control of an uninsured thief. Cole protested the absurd result of the statute, but the court rejoined, "If the legislature has chosen language that creates unexpected and unintended results, the legislature can amend the statute to express its actual intent."³⁴ Six legislative sessions passed without action.

In 2005, the Commission's Senate Bill 924 tweaked the statute's definitions to provide that a stolen vehicle *would* be an uninsured vehicle if it is driven without the insured's permission, if the thief lacks liability insurance, if the theft is reported within seventy-two hours,

26. *Cole v. Farmers Ins. Co.*, 814 P.2d 188,189 (Or. Ct. App. 1991).

27. *Id.*

28. *See, e.g., Whiteledge v. Jordan*, 586 N.E.2d 884 (Ind. Ct. App. 1992).

29. *Cole*, 814 P.2d at 189.

30. *Id.*

31. *Id.*

32. *Id.* at 190.

33. *See* OR. REV. STAT. § 743.793(2)(e)(F) (1991) (subsequently amended at OR. REV. STAT. § 742.504(1)(e)(A) (2005)) (providing that an "[u]ninsured vehicle" [did] not include . . . [a] vehicle owned by or furnished for the regular or frequent use of the insured or any member of the household of the insured").

34. *Cole*, 814 P.2d at 190.

and if the insured cooperates with police in any prosecution for theft.³⁵ The conditions resembled the conditions attendant to a claim for injury from a phantom motorist.³⁶ At the Commission's prompting, the legislature rectified an otherwise absurd result.

3. *UM/UIM Blindness to Belatedly Bankrupt Liability Insurers*

As unexpectedly as a thief, the insolvency of an insurance company may surprise the victim of a traffic accident. Oregon's defense and personal injury lawyers, however, are not so surprised. Since 1969, state insurance regulators have placed over four-hundred property and casualty insurers into liquidation.³⁷ Oregon law has always provided that an uninsured vehicle included a vehicle whose liability insurer became insolvent or bankrupt, but before 2005, the insolvency must have occurred within two years of the accident.³⁸ Often, two years passed before an injured person became medically stationary and able to resolve a claim. In such instances, an injured person may discover not only the insolvency of the negligent driver's insurance company, but also the lack of the injured person's own uninsured and underinsured motorist coverage. A belatedly uninsured motorist did not trigger the victim's uninsured motorist coverage.³⁹ Thus, whenever an insolvent liability insurer failed its negligent driver, a solvent UM/UIM insurer would fail its own insured if two years happened to pass between the accident and bankruptcy.

In 2005, the Commission's Senate Bill 926 ever so carefully excised the phrase "within two years of the date of the accident" from the definition of an uninsured vehicle whose liability insurer becomes insolvent or bankrupt.⁴⁰ No reason could be found for the two year time limitation.

35. 2005 Or. Laws, ch. 246, § 1 (codified at OR. REV. STAT. § 742.504(2)(i), (j)(D), (k)(A) (2005)).

36. OR. REV. STAT. § 742.504(2)(g).

37. NCIGF BOARD TASK FORCE ON INSOLVENCY ISSUES, NECESSARY REFORMS TO STRENGTHEN STATE PROPERTY & CASUALTY INSURANCE GUARANTY FUNDS TO MEET THE CHALLENGES OF THE 21ST CENTURY 10 (Feb. 2005), available at www.ncigf.org/Education/02-05_NCIGFBoardTaskForce_GFs.DOC.

38. OR. REV. STAT. § 742.504(2)(d)(A) (2003) (amended by 2005 Or. Laws, ch. 236, § 1).

39. *Id.*

40. 2005 Or. Laws, ch. 236, § 1 (codified at OR. REV. STAT. § 742.504(2)(i) (2005)).

4. Matching Limits, Multiple Claimants, and UM/UIM Coverage

A frequent problem occurs when several people are injured in the same accident. A negligent driver often carries the mandated minimum liability insurance of \$25,000 per person and \$50,000 per accident. If there were a number of accident victims, the negligent driver divided the liability insurance of \$50,000 per accident into small sums that were each less than the \$25,000 per person limit while an accident victim often carried UM/UIM insurance of \$25,000 per person and \$50,000 per accident. For example, a victim who recovered \$15,000 from the negligent driver would reasonably expect \$10,000 more from her own \$25,000 UIM coverage. Historically, however, Oregon law simply compared policy limits without regard to the number of claimants. A negligent driver who carried \$25,000/\$50,000 in liability insurance was deemed not to be “underinsured” with regard to the injured party who carried \$25,000/\$50,000 in UIM insurance, even if other victims exhausted the liability insurance and left the injured person with something less than \$25,000 in liability proceeds.⁴¹ No underinsurance was available even when the victim recovered less than the victim’s own UM/UIM per person limit.

In 1997, the Oregon legislature intended to remedy the problem by amending the UIM mandate in ORS 742.502. Rather than define underinsurance by comparing the UIM policy limit with the liability limit that an offending vehicle “is insured for,” an amendment in 1997 defined underinsurance by comparing the UIM policy limit with the amount that is recovered from the liability insurance.⁴² The change seemed to work, at least as to matching liability and UM/UIM limits above the statutory minimum sums. In *Takano v. Farmers Ins. Co.*,⁴³ the court held that multiple claimants with matching limits of \$100,000/\$300,000 were indeed entitled to underinsured motorist benefits to pay the difference between the individual liability proceeds recovered and the per-person UIM limit promised.⁴⁴ However, in *Takano* and again in *Mid-Century Ins. Co. v. Perkins*,⁴⁵ the court

41. See, e.g., *Lunsford v. Farmers Ins. Co.*, 846 P.2d 1206 (Or. Ct. App. 1993), *review denied*, 856 P.2d 317 (Or. 1993); *Shisler v. Fireman’s Fund Ins. Co.*, 741 P.2d 529 (Or. Ct. App. 1987). See also *Dasteur v. Am. Econ. Ins. Co.*, 874 P.2d 85 (Or. Ct. App. 1994).

42. 1997 Or. Laws, ch. 808, § 1 (amending OR. REV. STAT. § 742.502(3)).

43. 56 P.3d 491 (Or. Ct. App. 2002).

44. *Id.* at 494.

45. 149 P.3d 265 (Or. Ct. App. 2006), *rev’d*, 161 P.3d 943 (Or. 2007) (reversed on other

observed that the statute's drafters had left a "tension" between subsection (2)(a) and (3) in ORS 742.502.⁴⁶ Subsection (2)(a) continued to compare limits, while subsection (3) referred to the amount recovered from liability insurance.⁴⁷ A perceptive attorney who was the lead lawyer for the insurer in both cases contended to the defense bar that the 1997 fix only governed higher, elective limits of underinsurance coverage and did not apply to matching, minimum limits of \$25,000/\$50,000.⁴⁸ In his view, matching minimum limits afforded no underinsurance when a policyholder recovered less than \$25,000 in liability proceeds.⁴⁹

In 2005, the Commission's Senate Bill 923 removed any doubt that even matching minimum limits do provide underinsurance for multiple claimants. The old language in subsection (2)(a) of ORS 742.502 was amended to conform to the language of subsection (3) by explicitly referring to the amount recovered.⁵⁰ For good measure, a new subsection (5) declared that UM and UIM coverage must provide coverage when the limits of UM coverage equal the negligent driver's liability coverage and the amount of liability proceeds recovered is less than the insured's UM limits.⁵¹ Through this bill, one of the most commonly recurring gaps in underinsurance was repaired and reinforced.

5. Overlapping UM/UIM Policies

The Oregon Supreme Court speaks of Oregon's uninsured and underinsured motorist statutes as providing a "model" UM/UIM policy.⁵² The introductory paragraph of ORS 742.504 declares that no insurer may provide a policy with any less favorable coverage than the statutes' sample terms.⁵³ The statutes do provide a model of the minimum coverage that must be provided.⁵⁴ Yet, the court may have

grounds).

46. *Takano*, 56 P.3d at 493; *Mid-Century Ins. Co.*, 149 P.3d at 271.

47. *Id.*

48. John S. Cavanagh, *Matching Limits, Multiple Claimants: Underinsured Motorist Coverage and the 1997 Amendments to ORS 742.502*, OR. ASSOC. OF DEFENSE COUNSEL NEWSLETTER (OADC, Portland, Oregon), Winter 2002, at 15.

49. *Id.* at 18.

50. S.B. 923, 73rd Leg. Assem. (Or. 2005).

51. 2005 Or. Laws, ch. 235, §1 (codified at OR. REV. STAT. § 742.502(5)).

52. *See, e.g., Vega v. Farmers Ins. Co.*, 918 P.2d 95 (Or. 1996).

53. OR. REV. STAT. § 742.504 (2005).

54. *Id.*

meant something more. To speak of ORS 742.504 as a “model” of anything may betray a sense of humor. In 1967, the legislature repealed a simple statute that mandated UM insurance but left the terms of coverage to be determined in individual policies.⁵⁵ The legislature replaced the simple mandate with a comprehensive statute that provided the boilerplate terms of a UM policy.⁵⁶ The terms of the sample UM policy were enacted into law 30 years ago—they were hardly a model of clarity.

Among the most confounding subjects of insurance law is overlapping insurance.⁵⁷ A passenger may be injured in an owner’s car. The passenger may be covered by UM/UIM insurance on the car while she is also covered by her own policy or yet another policy. Which policy pays first and how much any of the policies pay becomes the subject of “other insurance” clauses found within the conflicting policies.⁵⁸ As if to settle the issue, subsection (9) of ORS 742.504 provides sample terms that a policy may use to declare when the policy is primary, excess, or pro rata in relation to another policy.⁵⁹ In addition, the statute provides permissible language to prevent “stacking” of coverage by declaring that no more can be paid than provided for under the largest of the policies. Subsection (9), however, was no one’s “model.” Despite its forbidding length and dense subject matter, it wholly failed to say which policy paid first. Without saying so, it assumed that the car’s policy was primary. The terms were not clear. Ambiguity meant insurers argued and lawyers litigated.

In 2005, the Commission’s Senate Bill 926 rewrote subsection (9) of ORS 742.504 in the hopes that it would speak plain English.⁶⁰ The model provision now declares that the policy on the car is primary.⁶¹ An insured person’s policy, when the person is in someone else’s car, is secondary.⁶² When like-policies collide—primary and primary or secondary and secondary—then they pay damages pro

55. 1967 Or. Laws, ch. 482, § 2 (codified at OR. REV. STAT. § 742.504).

56. *Id.*

57. Oregon’s unique contribution to the common law of overlapping policies begins with *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 346 P.2d 643 (Or. 1959).

58. *See, e.g.,* *Erickson v. Farmers Ins. Co.*, 21 P.3d 90 (Or. Ct. App. 2001) (stacking overlapping UIM policies that failed to conform to the statute).

59. OR. REV. STAT. § 742.504(9).

60. 2005 Or. Laws, ch. 236, §1 (amending OR. REV. STAT. § 742.504(9)).

61. OR. REV. STAT. § 742.504(9)(a)(A).

62. *Id.* § 742.504(9)(a)(B).

rata.⁶³ In 2007, the Commission's House Bill 2384 made one house-keeping change to restore an original phrase that had been inadvertently deleted in 2005.⁶⁴ In the end, the amendments on overlapping insurance may not send crowds into the street to celebrate, but they do make the statute a bit less of an embarrassment when referred to as a "model."

C. RELATED REPAIRS

The Oregon Law Commission's task of auto insurance reform began with an informal survey of Oregon's insurance problems posited by its Auto Insurance Work Group in 2003. The group identified over 20 potential problems and prioritized them for repair. Several of the high-priority problems did not win the group's consensus in 2005, but in 2007, two serious problems independently gained the legislature's attention. Another puzzling problem, although abandoned by the work group, may be resolved in cases before the Oregon Court of Appeals.

1. *The Government Gap in Everyone's UIM Coverage*

Governmental tort claim limits, as applied to UIM coverage, represented a little-known, yet serious failure of the auto insurance statutes. Oregon's statutes were written in 1967 to set up UM policy terms.⁶⁵ In 1981, underinsured motorist coverage was grafted onto the UM statutes without much thought.⁶⁶ A new mandate to provide underinsurance was added.⁶⁷ No one stopped to think about what boilerplate terms might be different in UIM terminology.⁶⁸ No one thought

63. *Id.* § 742.504(9)(b).

64. 2007 Or. Laws, ch. 131, §1 (amending OR. REV. STAT. § 742.504(9)(b)). House Bill 2384 restored "this insurance or" to subsection (9)(b), where the provision speaks of like-kind policies overlapping and owing pro rata contributions.

65. *See* 1967 Or. Laws, ch. 482, § 3.

66. *See* 1981 Or. Laws, ch. 586, § 3.

67. *See* 1981 Or. Laws, ch. 586, § 2.

68. When the underinsurance mandate was added in 1981, legislators assumed that the boilerplate language for UIM could be found in ORS 742.504. Accordingly, the Assistant Insurance Commissioner Frank Howatt explained to the Interim Joint Committee on the Judiciary that the law's drafter, attorney Noam Stampfer, chose simply to cross-reference the general terms of what is now ORS 742.504. He explained that the "intention is to avoid repeating all of the language that is now the uninsured motorist law." *Minutes: Final Hearings of the J. Comm. on the Judiciary*, 4 (October 5, 1980) (regarding the draft language of what would later become Senate Bill 31 and 1981 Or. Laws, ch. 586 (codified at OR. REV. STAT. § 742.502)). The drafters hoped that it would suffice to declare summarily, "Underinsurance coverage is subject

about the obscure provision in the UM terms that declared that a car owned by a government entity would not be treated as an uninsured car.⁶⁹ Presumably, the negligence of a driver of a car owned by a school district, city, or state agency would be paid under the Oregon Tort Claims Act, and, as a practical matter, would not be uninsured. That much seemed reasonable. Yet, no one stopped to think about tort claim limits when underinsured motorist coverage was added. Cautious Oregonians might well have chosen to purchase UIM protection *above* the moderate limits of the Tort Claims Act, which provide an individual with no more than \$100,000 to \$200,000 in damages.⁷⁰ What then would happen when an unsuspecting, amply insured Oregonian was gravely injured by a government driver?

In January 1995, an unsuspecting mother was traveling near Portland with her children, when a school employee negligently caused a head-on collision.⁷¹ The mother was left with a permanent brain injury.⁷² She recovered only what the tort claim limits permitted.⁷³ Her insurance company stipulated her damages were at least the amount of the \$1,000,000 in underinsurance that she and her husband had purchased.⁷⁴ Yet, the insurer contended that her UIM coverage should not pay.⁷⁵ A district court dismissed her claim.⁷⁶ The Oregon Court of Appeals found that the statute's "model" insuring clause merely promised that the UIM insurer would pay what the tortfeasor would pay.⁷⁷ Since a government would only pay its tort claim limits,

to ORS 742.504 . . ." which were the boilerplate terms of UM coverage. *See* OR. REV. STAT. § 742.502(4) (2005). The error of their ways became starkly apparent when the Oregon Supreme Court held that the absence of an "exhaustion clause," requiring recovery of the tortfeasor's liability insurance before assertion of a UIM claim, permitted injured parties to sue their own UIM carrier before the tortfeasor. *Vega v. Farmers Ins. Co.*, 918 P.2d 95 (Or. 1996). That oversight required legislative remedy in 1997. 1997 Or. Laws, ch. 808 (adding an exhaustion clause to OR. REV. STAT. § 742.504(4)(d)).

69. *See* OR. REV. STAT. § 742.504(2)(k)(C) (2005).

70. *See id.* § 30.270(1)(b). The effective limit may depend upon the characterization of damages in a particular case. *See Takano v. Farmers Ins. Co.*, 56 P.3d 491, 494 (Or. Ct. App. 2002).

71. *Surface v. American Spirit Ins. Cos.*, 962 P.2d 717, 718 (Or. Ct. App. 1998).

72. *Id.*

73. *Id.* She recovered her economic damages of \$59,042.53 and non-economic damages up to the limit of \$100,000. *Id.* at 718 n.3. An oddly worded statute provides that a person may recover general and special damages of up to \$100,000, and if damages are greater, additional special damages of up to \$100,000. OR. REV. STAT. § 30.270(1)(b).

74. *Surface*, 962 P.2d at 718.

75. *Id.*

76. *Id.*

77. *Id.* at 719-720; OR. REV. STAT. § 742.504(1)(a).

the money that the mother had already recovered from the school district was all anyone owed her, and the insurer owed nothing more.⁷⁸ Dismissal was upheld.⁷⁹ Her million dollar policy failed her.

The Court of Appeals labored to explain a discouraging view of the statute's "model" insuring clause while overlooking a more damning provision. Since 1967, the UM/UIM statute has declared that an "uninsured vehicle" does not include a vehicle owned by any government entity.⁸⁰ For all intents and purposes, the exception to the meaning of an "uninsured vehicle" applied to an "underinsured vehicle."⁸¹ Outrageous perhaps, but the court's decision was no fluke. It was the product of legislative oversight in 1981. A government vehicle simply could not be an uninsured or underinsured vehicle. It was not necessary for the court to wring its hands over whether the insuring clause contemplated tort claim limits.

When the Commission's work group failed to recommend change in 2005, the Oregon Trial Lawyers Association championed change in 2007. House Bill 2908 passed with an amendment that, notwithstanding the government's tort claim limits of ORS 30.270, an insurer must pay all sums that the injured person could ordinarily recover from the negligent underinsured motorist—presumably, therefore, an underinsured government employee.⁸² For good measure, House Bill 3086 referred to the statute's insuring clause and declared that the figurative sums potentially recoverable from the underinsured motorist should be calculated without regard to the tort claims limitations of ORS 30.260 through ORS 30.300.⁸³ The statute may, nonetheless, remain hexed. Both bills failed to remove or qualify the exception that declares an "uninsured vehicle" does not include a government-owned vehicle.⁸⁴ Although careless or contradictory, the bills are backed by legislative intent that should be unavoidable.⁸⁵ The

78. *Surface*, 962 P.2d at 719.

79. *Id.*

80. OR. REV. STAT. § 742.504(2)(k)(C).

81. *See id.* § 742.502(4).

82. 2007 Or. Laws, ch. 457, § 1 (amending OR. REV. STAT. § 742.504(1)(a)).

83. 2007 Or. Laws, ch. 782, § 3 (to be codified at OR. REV. STAT. § 742.504(2)(j)(B)).

84. *See* 2007 Or. Laws, ch. 2908, § 1 (leaving unamended the original OR. REV. STAT. § 742.504(2)(k)(C)); 2007 Or. Laws ch. 782, § 3 (leaving unamended a renumbered OR. REV. STAT. § 742.504(2)(l)(C)).

85. Although traditional statutory construction once required ambiguity before resort to legislative history, the 2001 amendment to ORS 174.020 should mean a party can freely offer the legislative history to explain the statute's purpose. *Cf.* *PGE v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1145-46 (Or. 1993) (doing traditional analysis) *with* 2001 Or. Laws, ch. 438, §

statutory dilemma should be resolved by the principle that the Insurance Code must be “liberally construed” in favor of the insurance-buying public.⁸⁶ Both bills demonstrate that Oregon does not intend the underinsurance provisions to ignore the negligence of government drivers.

2. Family Member Exclusion

The family member exclusion was another serious dispute recurring in Oregon’s courts that did not find a conclusive resolution. Auto policies commonly excluded any payment on behalf of an insured person for bodily injury to another person insured under the same policy, such as a resident of the insured’s household, from their liability coverage. Although a policy’s declaration page would promise \$100,000 liability coverage per person, the policy’s boilerplate would deny coverage if the injured person happened to be a family member. Perhaps a vestige of the guest passenger statute or a product of fear of fraud, policies traditionally shortchanged or denied liability coverage to the ones nearest and dearest to the policyholder. A curious dichotomy ensued. In *Collins v. Farmers Insurance Co.*,⁸⁷ the Oregon Supreme Court held that a policy that excluded coverage would be construed to provide the minimum, mandated limits of the Financial Responsibility Law, or \$25,000 per person and \$50,000 per accident.⁸⁸ In response, some insurers rewrote their policies to reflect the *Collins* decision. The policies generally stated that, notwithstanding the limits on the declaration page, their policy would provide the limits of the Financial Responsibility Law. In *North Pacific Insurance Co. v. Hamilton*,⁸⁹ the court held that the policy’s reference to the Financial Responsibility Law was so vague as to be incomprehensible.⁹⁰ Because the policy was vague, it would provide its promised policy limits without any reduction or partial exclusion.⁹¹ The decision, however, did not expressly overrule *Collins*. Seemingly, a policy that

1 (amending OR. REV. STAT. § 174.020). The legislature has liberalized the rules of construction. Today, even when text is unambiguous, a party should be permitted to offer legislative history. The court may consider it and give it the weight the court deems appropriate. See OR. REV. STAT. § 174.020(1)(b), (3) (2005).

86. OR. REV. STAT. §§ 731.008, 731.016.

87. 822 P.2d 1146 (Or. 1991).

88. *Id.* at 1151.

89. 22 P.3d 739 (Or. 2001).

90. *Id.* at 744.

91. *Id.*

flatly denied all liability coverage would afford \$25,000/\$50,000 in liability, while a policy that tried to drop its limits to the mandated minimums would actually provide full coverage. Insurers insisted that *Collins* and *Hamilton* left room for them to reduce liability coverage for injury to family members, provided that the policy expressly recited the dollar limits as \$25,000/\$50,000.⁹² Whether or not the insurers' view was correct, the court's struggle with the family member exclusion may have suggested that the time to outlaw the exclusion had come.

In 2005, the Commission's work group gave moderate priority to the issue but reached no consensus. In 2007, the Oregon Trial Lawyers Association promoted House Bill 3086, and it became law. The law confronted the exclusion that the courts could not confront as a matter of public policy. Amending Oregon's Financial Responsibility Law, the enactment declares: "Every motor vehicle liability insurance policy issued for delivery in this state shall contain a provision that provides liability coverage for each family member of the insured residing in the same household as the insured in an amount equal to the amount of liability coverage purchased by the insured."⁹³

The amendment resolved 16 years of debate and, more importantly, ended decades of denials of liability coverage for negligently injured family members.

3. *Conflicting Limits on PIP Recovery*

Oddly, the top priority when the Commission's work group started was a nasty little issue that still confounds every personal injury attorney and creates unnecessary disputes after the settlement of claims. Oregon mandates Personal Injury Protection (PIP) benefits in every auto policy, as a form of ready, no-fault medical and wage loss coverage.⁹⁴ When the personal injury claim settles, the PIP benefits may or may not be repaid. Oregon statutes provide PIP insurers with several means of recovering money from the liability insurer or injured party through direct inter-company reimbursement, PIP liens, or subrogation claims against the negligent motorist.⁹⁵ At the same time, the statutes provide the PIP beneficiary with two different mathemati-

92. *Id.* at 742-43.

93. 2007 Or. Laws, ch. 782, § 1 (to be codified at OR. REV. STAT. § 742.450(8)).

94. OR. REV. STAT. §§ 742.518-44 (2005), amended by 2007 Or. Laws, ch. 692, § 1; ch. 328, §§ 8-9; ch. 392, § 1.

95. OR. REV. STAT. §§ 742.534, 536, 538, amended by 2007 Or. Laws ch 392, § 1.

cal formulae with which to limit or prevent PIP repayment.⁹⁶

In ORS 742.542, the PIP beneficiary is promised that when economic and non-economic damages are sufficiently large, the PIP beneficiary may keep both UM/UIM benefits and PIP benefits so as to be made whole.⁹⁷ In other words, when the entire measure of damages is sufficiently large, UM/UIM and PIP benefits may “stack.”⁹⁸ Otherwise, PIP will pay down the injured parties’ damages, in order to assure that there will be no double payment of PIP and UIM for the same damages.⁹⁹

ORS 742.544, however, limits PIP recovery by comparing all insurance received with the PIP beneficiary’s economic damages.¹⁰⁰ PIP recovery is limited, or is permitted only to the extent that insurance benefits exceed economic damages.¹⁰¹ Non-economic damages are not part of this calculus. Indeed, non-economic damage dollars may pay for PIP reimbursement. Under this formula, the injured party is not “made whole.” The injured party is, in effect, “made half.”

Given two different mathematical limitations on PIP recovery, insurance companies and their injured policyholders predictably dicker. When personal injury cases ought to be concluded upon settlement with the tortfeasor, the quarrel with the PIP insurer is only begin-

96. In something less than a model of clarity, ORS § 742.542 provides:

Payment by a motor vehicle liability insurer of personal injury protection benefits for its own insured shall be applied in reduction of the amount of damages that the insured may be entitled to recover from the insurer under uninsured or underinsured motorist coverage for the same accident but may not be applied in reduction of the uninsured or underinsured motorist coverage policy limits.

OR. REV. STAT. § 742.542.

97. *Id.*

98. *Id.*

99. *Id.*

100. OR. REV. STAT. § 742.544.

101. *Id.* § 743.544. Unaware of any conflict with the preceding provision, ORS 742.544(1) provides that:

(1) A provider of personal injury protection benefits shall be reimbursed for personal injury protection payments made on behalf of any person only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 31.710 suffered by that person. As used in this section, “total amount of benefits” means the amount of money recovered by a person from:

(a) Applicable underinsured motorist benefits described in ORS 742.502(2);
(b) Liability insurance coverage available to the person receiving the personal injury protection benefits from other parties to the accident;
(c) Personal injury protection payments; and
(d) Any other payments by or on behalf of the party whose fault caused the damages.

ning.¹⁰² The disagreements can have but one answer. Either the two statutes conflict or they do not conflict. If they conflict, then any uncertainty in the Insurance Code should be construed liberally in favor of the insurance-buying public as mandated by ORS 731.008 and ORS 731.016.¹⁰³ The “make whole” principle should trump the “make half” principle. If the statutes do not conflict, then it must be because they are to be applied sequentially. What ORS 742.542 promises to “make whole,” ORS 742.544 would take back with a “make half” calculation.

Although the Commission’s work group abandoned the PIP recovery conflict, Oregon’s Court of Appeals is still confronting it. In the first of two cases, *Gaucin v. Farmers Insurance Co.*,¹⁰⁴ the Oregon Court of Appeals reversed the decision of the circuit court after the circuit court adopted a two-step approach that employed ORS 742.542 and ORS 742.544 sequentially.¹⁰⁵ While the opinion’s text addressed the insurer’s unusual argument that ORS 742.544 was an authorization for PIP recovery in its own right, the opinion’s footnotes evidenced the court’s rejection of the underlying notion that the two calculations should apply sequentially.¹⁰⁶ Undeterred, the same insurer persisted in a second case, *Farmers Insurance Co. v. Conner*,¹⁰⁷ contending again that its PIP recovery potential in ORS 742.544 overcomes the insured’s promise to be “made whole” in ORS 742.542. Unlike *Gaucin*, the *Conner* case cannot avoid addressing directly a reconciliation of the two statutes. If the *Gaucin* decision was not clear enough, then the *Conner* decision should be. As of this writing, the matter is under advisement.

102. For example, after a plaintiff settled his personal injury claim with the tortfeasor, and then after litigating UIM coverage on appeal, he still had to continue litigation with his insurer over the insurer’s demand for PIP recovery. *Takano v. Farmers Ins. Co.*, No. 0012-12473 (Multnomah County Cir. Ct. July 10, 2003) (Bearden, J.) (rejecting PIP insurers belated attempt at PIP subrogation), *following* *Takano v. Farmers Ins. Co.*, 56 P.3d 491 (2002) (upholding UIM claim).

103. *See* OR. REV. STAT. § 731.008 (“The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public.”); *id.* § 731.016 (“The Insurance Code shall be liberally construed and shall be administered and enforced by the Director of the Department of Consumer and Business Services to give effect to the policy stated in ORS 731.008.”).

104. 146 P.3d 370 (Or. Ct. App. 2006).

105. *Id.* at 372.

106. *Id.* at 372 n.4.

107. The parties argued this case before the Oregon Court of Appeals on March 16, 2007.

D. UNFINISHED BUSINESS?

1. *Time Limit Trap*

More problems remain. Oregon's insurer of legal malpractice, the Professional Liability Fund (PLF), would readily attest that Oregon attorneys and injured clients are trapped regularly and unwittingly by the time limit on UIM claims illustrated at ORS 742.504(12). Attorneys generally understand that, after the judgment or settlement of a personal injury claim against a tortfeasor, a claimant has two years from settlement or judgment in which to initiate the subsequent UIM claim.¹⁰⁸ The added two year period, however, only applies if the underlying personal injury claim was filed in court.¹⁰⁹ The problem arose when a 1997 amendment tacked on language in ORS 742.504(12) about an added two year time period without adjusting the existing language about filing an action in court.¹¹⁰ Practically speaking, many personal injury claims settle without a court filing. There is no sound reason in principle to require that a complaint be filed against a tortfeasor in court in order to provide the added two year UIM claim period. Naturally, attorneys assume they have two years from settlement to initiate the UIM claim. Yet without filing a complaint in the underlying case, the policy's time limit actually provides a strict limit of two years from the date of the accident. That date often passes within days of settling the underlying personal injury case against the tortfeasor. Consequently, claimants are often trapped by an unexpected limit. UIM claims against auto insurers become malpractice claims against Oregon attorneys.¹¹¹

2. *Unauthorized Boilerplate Exclusions*

Oregon courts have long treated ORS 742.454, a particular section in the Financial Responsibility Law, as the list of acceptable ex-

108. See OR. REV. STAT. § 742.504(12)(D).

109. *Id.*

110. 1997 Or. Laws, ch. 808, § 2 (amending OR. REV. STAT. § 742.504(12)(D)).

111. As salvage strategies, claimants may wish to check whether they have received a "consent to arbitrate" letter from the insurer that may constitute an offer to arbitrate which in fact does initiate arbitration under ORS 742.504(12); or, claimants may wish to see if their UIM insurer conditioned consent to settle an underlying personal injury case on holding a portion of the liability settlement in trust in such a way as to suggest a modification or waiver of the policy's time limit on a claim. The "offer to arbitrate" stratagem, suggesting the insurer satisfied its own time limit, is at issue in *Bonds v. Farmers Insurance Co.*, now waiting to be heard before the Oregon Court of Appeals.

clusions from coverage permitted in an insurance policy.¹¹² By its terms, ORS 742.454 expressly permits only two exclusions: injury to employees and damage to insured's property.¹¹³ Other statutes have been held to authorize two other ordinary exclusions not found in ORS 742.454: intentional injury and non-permissive use.¹¹⁴ Regular use of an uninsured car is another common exclusion that might be authorized.¹¹⁵ However, five exclusions routinely included in insurance policies are not expressly permitted by ORS 742.454: racing, the use of an auto for a charge, the business of auto repair or parking, nuclear energy, and punitive damages. Seemingly, all insurers ignore the mandate of ORS 742.454.¹¹⁶ The added exclusions are not controversial exclusions or underhanded limitations. Yet, if this statute is not brought into conformance with mainstream policies, eventually some hapless insurer will deny coverage for the mandated, minimum level of coverage (\$25,000 per person/\$50,000 per accident)¹¹⁷ in reliance on an ordinary exclusion that is not authorized by statute.¹¹⁸ In some

112. See *State Farm Fire & Cas. Co. v. Jones*, 759 P.2d 271, 273 (Or. 1988); *Dowdy v. Allstate Ins. Co.*, 685 P.2d 444 (Or. Ct. App. 1984), *review denied* 691 P.2d 481 (Or. 1984).

113. OR. REV. STAT. § 742.454 (2005) (formerly OR. REV. STAT. § 486.546 and then OR. REV. STAT. § 743.778).

114. *Snyder v. Nelson*, 564 P.2d 681, 684 (Or. 1977) (Financial Responsibility Law covers accidents, not intentional injury); *Mathews v. Federated Serv. Ins. Co.*, 857 P.2d 852, 856 (Or. Ct. App. 1993) (while lease meant lessor gave "consent" to lessee, a question of fact remained whether coverage existed for lessee's girlfriend). See also OR. REV. STAT. § 806.080(1)(b) (coverage required for those who drive with consent of named insured).

115. Per ORS 806.080(1)(a), the policy must describe "all motor vehicles for which coverage is provided by the policy." Not *all* vehicles in the universe must be insured under a given policy. *Farmers Ins. Co. v. Stout*, 728 P.2d 937, 940 (Or. Ct. App. 1986). Presumably, the policy can describe as insured those that are listed as insured under the policy, and, therefore, the policy should be able to describe as *not* insured those vehicles that are not listed. This limitation takes the form of the exclusion for vehicles available for the regular use of the insured that are not listed on the policy's declaration page or otherwise covered under the terms of the policy. See *generally* *U.S. Auto. Ass'n v. Reilly*, 858 P.2d 457, 460 (Or. Ct. App. 1993) ("business use" exclusion upheld citing ORS 806.080 because the law does not require coverage for vehicle not described in policy).

116. Insurers would be quick to note that all policies include a routine provision declaring that whenever necessary the policy will be construed to comply with a state's financial responsibility laws. Although such conformity clauses do exist, they provide little help to adjusters or coverage lawyers who make decisions based on the express terms and exclusions of a policy. The presence of a conformity clause is an imperfect excuse for inclusion of an unlawful exclusion that purports to deny all coverage in any amount.

117. OR. REV. STAT. § 806.070.

118. Coverage above the mandated, minimum amounts can be excluded by the terms of the policy, which are not described in ORS 742.454 because mandated liability coverage is only addressed to the minimum amounts required by the Financial Responsibility Law. *Collins v. Farmers Ins. Co.*, 822 P.2d 1146, 1148-49 (Or. 1991).

instances, wrongful denial may go unnoticed and uncorrected. In other instances, wrongful denial will result in wasted legal fees or will expose insurers to added damages for “bad faith” denials of coverage.

3. Attorney Fee Surprise

As Oregon courts construe statutes, new decisions will plow up problems like pottery shards in an old field. Recently, the Oregon Supreme Court unearthed a problem in a relatively new corner of an old statute. In 1999, insurers prompted the legislature to amend ORS 742.061, a statute that provided an insurer would owe an insured’s attorney fees if a settlement was not made within six months of proof of loss and if the insured’s recovery in court exceeded the amount of any settlement offered.¹¹⁹ The 1999 amendment created a matching pair of exceptions for PIP and UM/UIM cases. The amendment provided that an insurer could avoid any duty to pay a claimant’s attorney fees if the only issue was the amount of benefits and if the insurer said it was willing to arbitrate the dispute.¹²⁰ In *Grisby v. Progressive Preferred Insurance Co.*,¹²¹ the PIP insurer accepted coverage in general and said it was willing to arbitrate.¹²² It paid medical bills and wage loss, but it disputed whether certain chiropractic care was related to the accident.¹²³ To the insurer, it seemed to be a typical case that was susceptible to arbitration and free of plaintiff’s fees.¹²⁴ The court took a different view of “coverage” and held that the insurer’s refusal to reimburse the plaintiff for some medical bills put “coverage” at issue, not just the “amount” of PIP benefits.¹²⁵ The court found that “coverage” was not only a question about whether the policy covered the plaintiff and accident in general.¹²⁶ “Coverage” was at issue upon the refusal to pay on a single chiropractor’s “claim for services.”¹²⁷ As a result, the plaintiff could recover attorney fees, notwithstanding the

119. OR. REV. STAT. § 742.061.

120. 1999 Or. Laws, ch. 790, § 1 (codified at OR. REV. STAT. § 742.061(2) & (3)).

121. 166 P.3d 519 (Or. 2007).

122. *Id.* at 520.

123. *Id.*

124. The arbitration to which ORS 742.061(2) and (3) refers is binding, contractual arbitration. In *Grisby*, the arbitration that occurred was non-binding, court-annexed arbitration, which may be and was appealed for a trial anew in circuit court. *See* OR. REV. STAT. § 36.425(2); *Grisby*, 166 P.3d at 521.

125. *Grisby*, 166 P.3d at 524.

126. *Id.*

127. *Id.*

insurer's consent to arbitrate and consent to coverage in general.

In the eyes of Oregon insurers, the "safe harbor" provision in ORS 742.061(2) disappeared as to PIP claims. Nearly every PIP dispute became a fee claim overnight, since nearly every PIP dispute turns on whether continued treatment was "reasonable and necessary" or whether the accident caused the injuries alleged.¹²⁸ PIP disputes that were ideal for prompt arbitration are now invited onto the docket and into the courtroom where attorney fees will often exceed the PIP benefits in question.

In contrast, the neighboring "safe harbor" provision for UM/UIM claims at ORS 742.061(3) seems to operate successfully due to the nature of those claims. Typical disputes in UM/UIM claims involve the questions of fault of the offending motorist and extent of economic and non-economic damages.¹²⁹ Individual doctors do not assert "claims for services"; medical providers do not send bills directly to the UM/UIM insurers; and the UM/UIM claimant does not submit a series of separate "claims" for doctor bills. The claimant is seen as asserting one single and whole claim.¹³⁰ It seems that the "safe harbor" remains secure for UM/UIM coverage, while the "safe harbor" dries up for PIP coverage. Insurers who in 1999 promoted the passage of the same "safe harbor" concept for PIP and UM/UIM alike may question whether *Grisby* accords with their intent, if not legislative intent.¹³¹

As with every dispute, the task for the Oregon Law Commission is to discern between flaws in concept or drafting that lead to untoward results and legislative choices of public policy that were deliberately made and that remain defensible.¹³² Whether or not *Grisby's* at-

128. OR. REV. STAT. § 742.524(1)(a) (2005) (duty to pay all reasonable and necessary medical expenses).

129. Compare *id.* § 742.061(3) (UM/UIM safe harbor from fees) with *id.* § 742.504(1)(a) (UM/UIM turning on fault and damages).

130. Of course, insurers would observe that the same can be said for PIP claimants, but the PIP process (in which bills are submitted directly to the PIP insurer) made PIP disputes, rightly or wrongly, more susceptible to the *Grisby* interpretation of "coverage." The meaning of PIP "coverage" was more vulnerable to blurring a distinction between the insured's "claim" for reimbursement of medical bills and the medical providers' indirect "claim for services."

131. See 1999 Or. Laws, ch. 790, § 1 (amending OR. REV. STAT. § 742.061). See also *Minutes: Hearing Before S. Judiciary Comm. on SB 504*, 1-4, exhibits B, C (April 29, 1999).

132. Similarly, common law may declare a sound result, while legislators are free to make different public policy. The court, for example, may find issue preclusion is an unremarkable feature to ensue from arbitration. *Barackman v. Anderson*, 109 P.3d 370, 373 (Or. 2005). Yet, the plaintiff's bar is free to persuade the legislature that issue preclusion ought not to follow PIP arbitration, as the plaintiffs' bar did with 2007 Senate Bill 256. 2007 Or. Laws

torney fees, unauthorized exclusions, or time limit traps illustrate lingering problems for Commission consideration, they do suggest that some problems will persist, and new ones will arise.¹³³

E. CONCLUSION

In recent years, the Oregon Law Commission has given Oregon solutions to a half dozen problems that, for decades, the legislature and partisan interests failed to face. The Commission succeeded to the extent that it engaged collective expertise and minimized partisanship. No doubt, partisans will still assert dominion over future controversies. Yet, the Commission should remain undaunted. If the public interest is to be protected,¹³⁴ then the work of the Oregon Law Commission in insurance is not yet done. No one else fills its unique role.

ch. 328, § 3 (adopting a provision to be codified in ORS 742 making arbitration rulings unavailable as issue preclusion in subsequent personal injury litigation). Such is the work of policy-making rather than law reform.

133. Any one person's list of problems, including these examples, should be viewed cautiously. Only when such problems find a shared recognition in a work group, affirmed by the Commission, do such examples become problems worthy of review and remedy.

134. *See* OR. REV. STAT. § 173.338(1)(a) (duty to remedy "defects and anachronisms in the law"); *id.* § 731.008; *id.* § 731.016 (Insurance Code to be construed liberally in favor of the insurance-buying public).